(2)

No. 08-1415

In the Supreme Court of the United States

JOSEPH J. FILEBARK, II, ET AL., PETITIONERS

v.

DEPARTMENT OF TRANSPORTATION, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA

BRIEF FOR THE RESPONDENTS

ELENA KAGAN
Solicitor General
Counsel of Record
TONY WEST
Assistant Attorney General
WILLIAM KANTER
HOWARD S. SCHER
Attorneys
Department of Justice
Washington, D.C. 20530-0001
(202) 514-2217

QUESTION PRESENTED

The Federal Aviation Administration's Personnel Management System (PMS), along with the Civil Service Reform Act of 1978 (CSRA), establishes a comprehensive system that regulates virtually every aspect of federal employment and "prescribes in great detail the protections and remedies applicable * * * , including the availability of * * * judicial review." *United States* v. *Fausto*, 484 U.S. 439, 443 (1988) (describing the CSRA).

The question presented is whether the PMS and CSRA, in combination, preclude judicial review under generally applicable statutes of disputes concerning all employment-related matters, including those not defined as "prohibited personnel practices" or "adverse actions," unless such review is expressly authorized for federal employees by the PMS or by federal statute.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-13a), is reported at 555 F.3d 1009. The opinions of the district court (Pet. App. 14a-24a, 25a-43a) are reported at 542 F. Supp. 2d 1 and 468 F. Supp. 2d 3.

JURISDICTION

The judgment of the court of appeals was entered on February 13, 2009. The petition for a writ of certiorari was filed on May 14, 2009. This Court's jurisdiction is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. Congress enacted the Civil Service Reform Act of 1978 (CSRA or Act), Pub. L. No. 95-454, § 3, 92 Stat. 1111, to replace a "patchwork system" of federal personnel law "with an integrated scheme of administrative

and judicial review, designed to balance the legitimate interests of the various categories of federal employees with the needs of sound and efficient administration." *United States* v. *Fausto*, 484 U.S. 439, 445 (1988). The personnel system created by the CSRA provides a "comprehensive" scheme of protections and remedies for federal employment disputes, *id.* at 448, and "prescribes in great detail the protections and remedies applicable * * * , including the availability of * * * judicial review." *Id.* at 443. Because of its comprehensive nature, courts have routinely held that "Congress meant to limit the remedies of federal employees bringing claims closely intertwined with their conditions of employment to those remedies provided in the [CSRA]." *Lehman* v. *Morrissey*, 779 F.2d 526, 527-528 (9th Cir. 1985). See *Fornaro* v. *James*, 416 F.3d 63, 67 (D.C. Cir. 2005) ("what you get under the CSRA is what you get"); *Graham* v. *Ashcroft*, 358 F.3d 931, 933-936 (D.C. Cir.), cert. denied, 543 U.S. 872 (2004).

Under legislation enacted in 1995 and 1996, and amended in 2000, Congress revised federal personnel law as it applies to employees of the Federal Aviation Administration (FAA). Department of Transportation and Related Agencies Appropriations Act, 1996, Pub. L. No. 104-50, § 347, 109 Stat. 460 (repealed by Wendell H. Ford Aviation Investment and Reform Act for the 21st Century, Pub. L. No. 106-181, § 307(d), 114 Stat. 125); Federal Aviation Reauthorization Act of 1996, Pub. L. No. 104-264, § 253, 110 Stat. 3237 (49 U.S.C. 40122); Pub. L. No. 106-181, §§ 307(a), 308, 114 Stat. 124, 126 (49 U.S.C. 40122(a) and (g)). In those enactments, Congress made certain provisions of the CSRA applicable to FAA employees, but exempted the agency from the remaining provisions. See 49 U.S.C. 40122(g)(2). In lieu of the

inapplicable provisions of the CSRA, Congress directed the FAA to create a "personnel management system for the Administration that addresses the unique demands on the agency's workforce." 49 U.S.C. 40122(g)(1). To discharge that responsibility, the agency created the FAA Personnel Management System. See FAA *MYFAA Employee Site* (last modified June 25, 2009) (PMS), <https://employees.faa.gov/org/staffoffices/ahr/policy_guidance/hr_policies/pms/>.

The applicable provisions of the CSRA and the PMS together comprise a personnel system that is as fully comprehensive as that created by the CSRA. Like the CSRA, the hybrid FAA personnel system is an "elaborate remedial system that has been constructed step by step, with careful attention to conflicting policy considerations." *Bush* v. *Lucas*, 462 U.S. 367, 388 (1983).

2. The CSRA and the hybrid FAA system each essentially creates a three-tiered system providing graduated procedural protections based on the seriousness of the personnel action at issue. Greatly simplified, the systems provide as follows: (a) for "adverse actions"—*i.e.*, "major personnel actions specified in the statute"—the systems afford an explicit right of judicial review in the Federal Circuit "after extensive prior administrative proceedings," *Carducci* v. *Regan*, 714 F.2d 171, 175 (D.C. Cir. 1983) (Scalia, J.);[1] (b) for specified

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[1] FAA employees also have the option of pursuing claims regarding specified actions through the agency's "Guaranteed Fair Treatment" process, including the FAA Appeals Procedure, which allows employees ultimately to seek review of agency action in the federal courts of appeals. 49 U.S.C. 40122(h); PMS ch. III, para. 5(m). Although the PMS does not use the term "adverse action," the list of personnel actions that may be pursued through the Guaranteed Fair Treatment process tracks the list of actions defined as "adverse actions" in the CSRA.

"prohibited personnel practices"—*i.e.*, "personnel actions infected by particularly heinous motivations or disregard of law"—the systems provide administrative mechanisms to be followed by judicial review in the Federal Circuit under specified circumstances, *ibid.*; and (c) for remaining minor personnel matters involving bargaining-unit employees, the systems provide a grievance procedure followed by binding arbitration and sharply limited judicial review in the courts of appeals, 5 U.S.C. 7121, 7122, and 7123; and for such matters involving non-bargaining unit employees, the systems generally limit review to a separate internal agency grievance mechanism, see, *e.g.*, PMS ch. III, para. 4.

Employee complaints that are subject to a grievance procedure established pursuant to a collective bargaining agreement (CBA) are governed by Chapter 71 of the CSRA, which continues to apply to FAA personnel, 49 U.S.C. 40122(g)(2)(C). Under Chapter 71: federal employees may join unions to engage in collective bargaining, 5 U.S.C. 7101, 7102; management is obligated to engage in collective bargaining, 5 U.S.C. 7111, 7114(a)(1), 7117; and every CBA is required to contain a procedure for "the settlement of grievances," 5 U.S.C. 7121(a)(1). However, a "collective bargaining agreement may exclude any matter from the application of the grievance procedures." 5 U.S.C. 7121(a)(2). If parties engage in a negotiated grievance process, but are unable to achieve a satisfactory settlement of the employee's grievance, Section 7121 provides that the matter "shall be subject to binding arbitration which may be invoked by either the [union] or the agency." 5 U.S.C.

Compare PMS ch. III, para. 5(a), with 5 U.S.C. 7512. None of those actions is implicated in this case.

7121(b)(1)(C)(iii). Either party may then challenge the arbitrator's decision by filing exceptions with the Federal Labor Relations Authority (FLRA), 5 U.S.C. 7122(a), which may, in turn, "take such action and make such recommendations concerning the [arbitral] award as it considers necessary, consistent with applicable laws, rules, or regulations." 5 U.S.C. 7122(a)(2). The FLRA's decision regarding a challenge to an arbitration award is not subject to judicial review, unless the matter decided by the arbitrator involves an unfair labor practice. 5 U.S.C. 7123(a)(1). The FLRA does not have authority to review an arbitral award if the subject of the grievance is an adverse employment action covered by 5 U.S.C. 4303 or 7512. See 5 U.S.C. 7122(a). In such instances, the employee may seek judicial review of the arbitrator's award under 5 U.S.C. 7703 to the same extent as if the matter had been decided by the Merit Systems Protection Board (MSPB).

The CSRA's broad definition of "grievance" (incorporated into the PMS by 49 U.S.C. 40122(g)(2)(C)) includes "any complaint * * * by any employee concerning any matter relating to the employment of any employee" and "any claimed violation, misinterpretation, or misapplication of any law, rule, or regulation affecting conditions of employment." See 5 U.S.C. 7103(a)(9)(A) and (C)(ii). That broad definition encompasses both "prohibited personnel practice[s]," 5 U.S.C. 2302(a); PMS intro, Section VIII, and "adverse employment actions" (actions taken because of unacceptable performance, suspensions, or reductions in grade, etc.), 5 U.S.C. 4303, 7512; PMS ch. III, Section 3. Thus, an FAA employee covered by a CBA may contest prohibited personnel practices and adverse actions through the grievance procedures established by that agreement.

The CSRA provides alternative administrative remedies—apart from the negotiated grievance procedure—for prohibited personnel practices involving discrimination on the basis of race, sex, religion, age, disability, and other protected grounds, and for certain adverse employment actions. See 5 U.S.C. 2302(b)(1), 4303, 7512. Before 1994, if a grievance was covered by both the negotiated grievance procedure and other administrative procedures, an employee was required to elect which of those procedures he wished to pursue. 5 U.S.C. 7121(d) and (e)(1) (1988). But if the grievance did not involve one of the specified prohibited personnel practices or adverse employment actions for which alternative remedies were preserved, and if the matter was not excluded from the grievance procedures under the CBA, Section 7121(a)(1) provided that the negotiated grievance "procedures shall be the exclusive procedures for resolving grievances which fall within its coverage." 5 U.S.C. 7121(a)(1) (1988).

In 1994, Congress added a new Subsection (g) to Section 7121, which expanded employees' available options by giving employees covered by a CBA a choice of alternative remedies for "prohibited personnel practice[s]" not previously covered by Subsection (d), which governs discriminatory personnel actions. Act of Oct. 29, 1994, Pub. L. No. 103-424, § 9(b), 108 Stat. 4365. Under the 1994 amendment adding Section 7121(g), employees may challenge a prohibited personnel practice under the negotiated grievance procedure, or they may elect to pursue available administrative remedies through appeal to the MSPB, or by seeking corrective action from the Office of Special Counsel. 5 U.S.C. 7121(g). Thus, under current law, when a grievance is covered both by a collective bargaining agreement's negotiated grievance

procedures and by other procedures under Section 7121(d), (e) or (g), an employee has a choice of administrative remedies. 5 U.S.C. 7121(d), (e)(1), (g)(2) and (3).

To accommodate the addition of Section 7121(g), Congress also made what it characterized as "Technical and Conforming Amendments" to Section 7121(a)(1), the provision that requires CBAs to have grievance procedures and generally renders those procedures exclusive. Pub. L. No. 104-264, § 9(c), 108 Stat. 4366. The amendment made two revisions to the second sentence of Section 7121(a)(1): it added Subsection (g) to its list of statutory exceptions to the provision making CBA grievance procedures exclusive, and it added the word "administrative" between "exclusive" and "procedures." As amended, Section 7121(a)(1) provides:

> Except as provided in paragraph (2) of this subsection, any collective bargaining agreement shall provide procedures for the settlement of grievances, including questions of arbitrability. Except as provided in subsections (d), (e), and (g) of this section, the procedures shall be the exclusive administrative procedures for resolving grievances which fall within its coverage.

5 U.S.C. 7121(a)(1).

Non-bargaining unit FAA employees who raise employment-related complaints concerning neither adverse actions nor prohibited personnel practices must utilize the grievance procedures set forth in the PMS. See PMS ch. III, para. 4(a) (establishing grievance procedure for "all employees of FAA not covered by a collective bargaining grievance procedure"). Those procedures act as a catch-all, covering all employment-related complaints that are neither prohibited personnel prac-

tices nor major adverse actions. *Id.* para. 4(b) and (c).[2] Paragraph 4 of the PMS explicitly designates the FAA Grievance Procedure as "the sole and exclusive method by which" FAA employees who are not members of a bargaining unit "can seek relief from the FAA, Department of Transportation, and/or the United States Government for issues related to the matters covered by this paragraph," and declares that "[t]he final decision of [the] FAA Grievance Procedure is not subject to review in any other forum." *Id.* para. 4(a) and (f)(ii).

3. a. Petitioners are four FAA employees who are or were employed at the Albuquerque, New Mexico Air Traffic Control Center (Albuquerque Center). Petitioners Joseph Filebark and John Havens are Air Traffic Control Specialists; petitioners Jerry Todd and Richard Boatman are Air Traffic Control Supervisors. All four petitioners were paid according to agreements negotiated between the National Air Traffic Controllers Association (NATCA) and the FAA; Filebark and Havens were bargaining members represented by NATCA.[3] The negotiated agreements created a system in which employee compensation was determined by the volume of traffic and complexity of operations at each facility. Petitioners claim that the classification system utilized incorrect air traffic figures for the Albuquerque Center,

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[2] Subparagraph 4(c)(xviii) exempts, *interalia*, "matters that are subject to appeal under FAA Appeals Procedure" (*i.e.*, "major adverse personnel action[s]"), 49 U.S.C. 41022(j); PMS ch. III, para. 5(a), as well as "matters covered by any other statutory appeals process" (*i.e.*, prohibited personnel practices), see 49 U.S.C. 40122(g)(2)(H); 5 U.S.C. 1204, 1211-1218, 1221, 7701-7703; PMS Intro., para. VIII.

[3] The two supervisory petitioners were not members of the NATCA, but were paid according to these negotiated agreements as a matter of policy adopted by the FAA Administrator.

which resulted in petitioners' salary levels' being too low. Pet. App. 2a-3a, 16a-18a.

In April 2000, petitioner Filebark filed a salary-level classification grievance with the Albuquerque Center, in accordance with the procedures established by the bargaining agreement. His grievance was denied, and NATCA subsequently refused his request to pursue the matter through arbitration. Representatives of the Albuquerque Center later applied on behalf of the Center for the salary-level upgrade, but that request was denied pending completion of a validation process for the computer system that performed the air traffic calculations. NATCA eventually filed a grievance on behalf of the Albuquerque Center employees, but later withdrew the grievance before it was resolved. Pet. App. 3a, 16a-17a.

Petitioner Todd, a non-bargaining unit controller, also attempted to file a grievance, but was unsuccessful. In July 2001, Todd filed suit in the Court of Federal Claims, which dismissed his suit in a decision affirmed by the Federal Circuit. See Pet. App. 20a-21a, 44a-63a.

b. Petitioners filed this action in federal district court, seeking review under the Administrative Procedure Act (APA), 5 U.S.C. 701 *et seq.*, of the FAA's pay classification determinations for air traffic controllers at the Albuquerque Center. Petitioner Filebark also sought review of his grievance, citing 5 U.S.C. 7121(a)(1) as the source of that review. Pet. App. 2a-4a. None of the petitioners asserted a constitutional claim. The district court first dismissed the claims of the bargaining unit petitioners for lack of jurisdiction, determining that the grievance procedures negotiated in the CBA provided the exclusive remedy for resolution of their claims. *Id.* at 14a-24a. In a subsequent order, the court also

dismissed the claims of the non-bargaining unit petitioners on jurisdictional grounds, finding that the FAA's personnel management system precludes judicial review of FAA facility classification determinations. *Id.* at 25a-43a.

c. Petitioners appealed, and the court of appeals affirmed, holding that the CSRA precludes judicial review of petitioners' claims. The court held that Section 7121(a)(1) does not establish a federal employee's right to seek a judicial remedy for a grievance subject to a collective bargaining agreement. The Court also held that petitioners could not pursue their claims under the APA, 5 U.S.C. 702, because the CSRA precludes federal employees from seeking redress for employment-related claims through a judicial remedy unless such remedy is specifically permitted in the CSRA. Pet. App. 6a-7a, 9a-12a.

The court of appeals noted that the question before it was the one left unanswered by this Court in *Whitman* v. *Department of Transportation*, 547 U.S. 512, 514 (2006): "whether § 7121 (*or the CSRA as a whole*) removes the jurisdiction given to the federal courts or otherwise precludes employees from pursuing a claim under the APA." Pet. App. 7a (quoting *Whitman*, 547 U.S. at 514 (emphasis added; citation omitted)). Considering the 1994 amendment to Section 7121(a)(1), the court noted that the Federal Circuit in *Mudge* v. *United States*, 308 F.3d 1220, 1227 (2002), had treated the amended provision as permitting judicial review of grievances. But the court concluded that *Mudge* was incorrect and that "it is emphatically untrue that '§ 7121(a)(1) *establishes* [a] federal employee's right to seek judicial remedy for [a] grievance subject to negoti-

ated procedures in [a] collective bargaining agreement.'" Pet. App. 5a-7a (citation omitted; brackets in original).

The court next examined whether petitioners could seek redress of their employment-related complaints under the APA. Citing its own precedent in *Carducci* v. *Regan*, 714 F.2d 171, 172 (D.C. Cir 1983), and this Court's holding in *United States* v. *Fausto*, *supra*, the court concluded that the comprehensiveness of the CSRA precludes federal employees from pursuing remedies through the APA. Pet. App. 9a-12a. In keeping with existing D.C. Circuit precedent, the court reaffirmed that "what you get under the CSRA is what you get." *Ibid.* (relying on *Graham* v. *Ashcroft*, *supra*, and *Fornaro* v. *James*, *supra*).

The court of appeals acknowledged that Congress exempted the FAA from most of the CSRA's provisions, but found that exemption to be further evidence of Congress's intent to preclude judicial remedies for FAA employees unless such remedies are specifically authorized by the FAA's hybrid scheme. Pet. App. 10a-11a. The court concluded:

> Far from saving an APA claim, Congress's exemption [of the FAA] from the CSRA signals the same thing as Congress's omission of the type of personnel action at issue in *Graham* or the type of employees at issue in *Fausto*—namely that Congress intended to provide these employees with no judicial review. This is because we treat the CSRA and Congress's related employment statutes as covering the field of federal employee claims, and so our cases teach that those left out of this scheme are left out on purpose.

Ibid. The court further noted that, because Congress exempted the FAA from the CSRA in order to provide

for "greater flexibility" in employment decisions, inferring "a unique right of access to the courts" for FAA employees "would frustrate rather than further that intent." *Id.* at 11a.

Finally, the court rejected petitioners' argument that it was "inconceivable" that Congress would allow the FAA to devise a payment plan and then violate it with impunity. Pet. App. 11a. The court noted that the petitioners who are covered by the CBA do have a remedy: if the FAA fails to live up to its agreements, the union can pursue the matter and, if the union fails to live up to its duty of fair representation, the petitioners "can pursue the union." *Id.* at 12a-13a. The court therefore affirmed the district court's conclusion that petitioners' APA claims "are precluded by the CSRA as a whole regardless of who brings them." *Id.* at 13a-14a.[4]

ARGUMENT

The court of appeals correctly held that the CSRA, in conjunction with the PMS, precludes judicial review of all employment-related claims—including claims that do not qualify as "prohibited personnel practices" or as "adverse actions" under either scheme—unless such review is specifically permitted by the CSRA or the PMS. The United States agrees with petitioner, however, that this case presents a recurring question of substantial importance on which there is a direct conflict among the courts of appeals. Review by this Court would therefore be appropriate.

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[4] In a ruling not challenged, the court of appeals rejected petitioners' contention that the district court violated the law of the case doctrine in reversing, without a change in law or facts, its previous denial of a motion to dismiss the APA claims. Pet. App. 8a-9a.

1. Petitioners' argument that the CSRA does not preclude judicial review of the claims at issue has two components. The first is that the APA provides a cause of action for all federal employees, whether or not covered by a negotiated grievance procedure, for matters that the CSRA does not define as either a prohibited personnel practice or an adverse action.[5] The second is that Section 7121(a) specifically authorizes judicial review of all matters subject to the grievance procedure in a CBA and that the APA provides the cause of action for

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[5] The court of appeals' determination that the CSRA precludes judicial review of all employment-related claims, including claims that are neither "prohibited personnel practices" nor "adverse actions" unless such review is specifically provided for federal employees in the CSRA or elsewhere, is consistent with decisions from the Second, Fourth, Fifth, Sixth, Ninth, and Tenth Circuits. *E.g.*, *Tiltti* v. *Weise*, 155 F.3d 596, 600-601 (2d Cir. 1998); *Pinar* v. *Dole*, 747 F.2d 899, 912-913 (4th Cir. 1984), cert. denied, 471 U.S. 1016 (1985); *Broadway* v. *Block*, 694 F.2d 979, 981-986 (5th Cir. 1982); *Ryon* v. *O'Neill*, 894 F.2d 199, 201-204 (6th Cir. 1990); *Veit* v. *Heckler*, 746 F.2d 508, 511 (9th Cir. 1984); *Weatherford* v. *Dole*, 763 F.2d 392, 393-394 (10th Cir. 1985). The decision conflicts, however, with the narrower rule applied in the Federal and First Circuits, which have held that the CSRA does not bar judicial review of an employment-related decision that is not governed by the CSRA provisions covering prohibited personnel practices and adverse actions. *E.g.*, *Worthington* v. *United States*, 168 F.3d 24, 26-27 (Fed. Cir. 1999); *Romero* v. *United States*, 38 F.3d 1204, 1211 (Fed. Cir. 1994); *Dugan* v. *Ramsay*, 727 F.2d 192, 194-195 (1st Cir. 1984); but see *Irizarry* v. *United States*, 427 F.3d 76, 78 n.2 (1st Cir. 2006) (noting, but not deciding, that *Dugan* may be inconsistent with this Court's later decision in *Fausto*).

that review.[6] The court of appeals correctly rejected both contentions. Pet. App. 6a-13a.

a. Petitioners are correct (Pet. 11-12) that the courts of appeals disagree about whether the CSRA precludes judicial review of employment-related actions that are not covered by Chapter 75 of the CSRA (Adverse Actions). But petitioners misunderstand the scope of the CSRA when they describe actions that are outside the purview of Chapter 75 as "no[t] otherwise covered by the Act." See Pet. i, 12. The CSRA covers every employment-related action taken in the federal employment context. When Congress enacted the CSRA, it "comprehensively overhauled the civil service system," *Lindahl* v. *OPM*, 470 U.S. 768, 773 (1985), "prescrib[ing] in great detail the protections and remedies" available to federal employees, "including the availability of administrative and judicial review," *Fausto*, 484 U.S. at 443.

This Court has had a number of occasions to consider whether federal employees may seek judicial review of work-related disputes when such review is not specifically provided by the CSRA. In each case, the Court has held that federal employees are limited to the remedies explicitly provided or referenced by the CSRA itself. Thus, in *Bush* v. *Lucas*, 462 U.S. 367 (1983), the Court refused to recognize an implied cause of action under *Bivens* v. *Six Unknown Named Agents of Federal Bu-*

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[6] The court of appeals in this case agreed with the Ninth Circuit on this question, see *Whitman* v. *Department of Transportation*, 382 F.3d 938 (2004), rev'd on other grounds, 547 U.S. 512, 513 (2006); but those courts are in conflict with the Federal Circuit, see *Mudge* v. *United States*, 308 F.3d 1220, 1228-1230 (2002), and the Eleventh Circuit, see *Asociacion De Empleados Del Area Canalera* v. *Panama Canal Comm'n*, 329 F.3d 1235, 1241 (2003).

reau of Narcotics, 403 U.S. 388 (1971), to enable a federal employee to sue an agency official for damages for alleged constitutional violations in employment. Although the Court had recognized a damages cause of action against federal officials for constitutional violations in other contexts, the Court held that it would be "inappropriate" to supplement the "comprehensive procedural and substantive provisions" regulating federal employment with a new judicial remedy. *Bush*, 462 U.S. at 368. See *Schweiker* v. *Chilicky*, 487 U.S. 412 (1988).

Similarly, in *Fausto*, the Court held that the CSRA's "integrated scheme of administrative and judicial review" precluded federal employees from obtaining judicial review in a suit for back pay under the Tucker Act, 28 U.S.C. 1491, given that the CSRA did not explicitly provide for that remedy. *Fausto*, 484 U.S. at 445. Considering both the language and the structure of the CSRA, the Court held "that the absence of provision for these employees to obtain judicial review is not an uninformative consequence of the limited scope of the statute, but rather a manifestation of a considered congressional judgment that they should not have statutory entitlement to review." *Id.* at 448-449. And in *Karahalios* v. *National Federation of Federal Employees, Local 1263*, 489 U.S. 527 (1989), the Court held that judicial enforcement of the duty of fair representation is barred because the CSRA empowers the FLRA to enforce a union's statutory duty of fair representation and because "[t]here is no express suggestion in [the CSRA] that Congress intended to furnish a parallel remedy in a federal district court to enforce" the duty. *Id.* at 532.

A straightforward application of *Fausto* compels the conclusion that the CSRA precludes petitioners from pursuing their grievances (which concern neither pro-

hibited personnel practices nor adverse actions) by suing directly in district court under the APA. Indeed, the basis for preclusion is even stronger in these circumstances than it was in *Fausto* because the APA (unlike the Back Pay Act, 5 U.S.C. 5596 *et seq.*, and Tucker Act, 28 U.S.C. 1346 *et seq.*) explicitly states that its provisions are inapplicable if another statute "preclude[s] judicial review." 5 U.S.C. 701(a)(1); see 5 U.S.C. 702; *Webster* v. *Doe*, 486 U.S. 592, 599 (1988). Congress expressly provided in the CSRA for a right of judicial review of grievances in only two specific circumstances: when the matter involves an adverse action covered by 5 U.S.C. 4303 or 7512, see 5 U.S.C. 7121(f), and when the matter involves a claim of an unfair labor practice and the arbitral award has been reviewed by the FLRA, see 5 U.S.C. 7123(a). Moreover, when Congress wished to preserve existing remedial schemes outside the CSRA, it said so directly: the CSRA expressly preserves employees' right to bring suit under Title VII of the Civil Rights Act of 1964, 42 U.S.C. 2000e *et seq.*, and other laws prohibiting discrimination. 5 U.S.C. 2302(d); see PMS intro. para. VIII(b)(ii). The "highly selective manner in which Congress has provided for judicial review" (*Switchmen's Union of N. Am.* v. *National Mediation Board*, 320 U.S. 297, 305 (1943)), within the context of the comprehensive and "integrated scheme of administrative and judicial review" that the CSRA created, is a "manifestation of a considered congressional judgment" that employees do not have a general right to judicial review of workplace complaints. *Fausto*, 484 U.S. at 445, 448; accord *Block* v. *Community Nutrition Inst.*, 467 U.S. 340, 347 (1984); *United States* v. *Erika, Inc.*, 456 U.S. 201, 208 (1982).

It is true that the FAA is for the most part exempt from the CSRA, except for Chapter 71 (see p. 4, *supra*);[7] but Congress created the exemption in recognition of the "significant problems" that confront "the national air transportation system," and as a way to provide the FAA with increased flexibility so as to help it fulfill its "unique" mission of "operat[ing] 24 hours a day, 365 days of the year * * * [in] a state-of-the-art industry," Pub. L. No. 104-264, §§ 221(1) and (14), 110 Stat. 3227. Congress directed the agency to establish a "personnel management system * * * that addresses the unique demands on the agency's workforce" to operate in lieu of the CSRA provisions Congress made inapplicable to the FAA. 49 U.S.C. 40122(g)(1). The resulting PMS closely parallels the CSRA and, together with the applicable provisions of the CSRA, is as fully comprehensive as the system created by the CSRA itself.

The PMS and CSRA do not provide for judicial review of petitioners' grievances. Petitioners complain about the pay classification of the facility at which they are or were employed. The FAA's hybrid personnel system does not provide for judicial review of agency decisions regarding the pay classifications of facilities that employ FAA personnel. See C.A. App. 110-111. Nor does it provide for judicial review of matters subject to the FAA Grievance Procedure, which covers all employment-related concerns of non-bargaining-unit employees other than prohibited personnel practices and adverse actions. PMS ch. III, para. 4. The court of appeals, therefore, correctly held that judicial review of the employment-related claims at issue in this case is

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[7] With one exception not relevant here, Chapter 71 of the CSRA applies to the FAA workforce and governs FAA employees' grievances subject to grievance procedures negotiated under CBAs.

barred because it is not specifically authorized under the CSRA or the PMS. See, *e.g.*, Pet. App. 10a (citing *Fornaro* v. *James*, 416 F.3d 63, 67 (D.C. Cir. 2005) ("what you get under the CSRA is what you get")).[8] As the court pointed out, Congress's decision generally to exempt the FAA from the CSRA "signals the same thing as Congress's omission of the type of personnel action at issue in *Graham* or the type of employees at issue in *Fausto*—namely that Congress intended to provide these employees with no judicial review." *Ibid.*[9]

b. The court of appeals also correctly rejected the bargaining unit petitioners' contention that, regardless of the general preclusive effect of the CSRA and PMS, they are entitled to judicial review because the 1994 technical amendment to 5 U.S.C. 7121(a)(1) affirmatively authorizes such review for work-related grievances covered by a CBA. See Pet. App. 6a-7a (rejecting petitioners' argument that "§ 7121(a)(1) *establishes* [a] federal employee's right to seek judicial remedy for [a] grievance subject to negotiated procedures in [a] collective bargaining agreement"). Contrary to the holdings of the Federal and Eleventh Circuits in *Mudge* v. *Uni-*

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[8] This issue is also presented in the petition for a writ of certiorari in *Grosdidier* v. *Chairman, Broadcasting Board of Governors*, No. 08-1418 (May 14, 2009). The *Grosdidier* petition raises the preclusion issue just addressed but not the issue concerning the 1994 amendment to Section 7121(a) that is discussed below. As a result, the United States is filing a response in the *Grosdidier* case recommending that the Court either hold the petition there and dispose of it in light of its resolution in this case or deny the petition.

[9] This Court's holding in *Darby* v. *Cisneros*, 509 U.S. 137, 145-154 (1993), that a reviewing court in an APA case lacks discretion to require exhaustion of administrative remedies, does not apply to this case because Congress intended to preclude judicial review of petitioners' claims entirely, including review under the APA.

ted States, 308 F.3d 1220 (Fed. Cir. 2002), and *Asociacion De Empleados Del Area Canalera* v. *Panama Canal Comm'n*, 329 F.3d 1235 (11th Cir. 2003) (see p. 14 note 6, *supra*), the 1994 technical amendment to Section 7121(a)(1) did not *sub silentio* reverse well-settled law to create a new right to judicial review of federal employee grievances.[10]

By inserting the word "administrative" in Section 7121(a)(1), Congress did not *explicitly* create a right of judicial review. Nor is there any indication that Congress intended to *implicitly* create such a right. This Court had made clear prior to 1994 that only an express statutory provision would create a right of judicial review, given that "the CSRA's integrated scheme of administrative and judicial review foreclose[s] an implied right to [district court] review." *Karahalios*, 489 U.S. at

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[10] Prior to the 1994 amendment to Section 7121(a)(1), the en banc Federal Circuit held in *Carter* v. *Gibbs*, 909 F.2d 1452 (1988), cert. denied, 498 U.S. 811 (1990), that federal employees covered by a CBA could not bring suit in district court for overtime pay under the FLSA, and that "the procedures [set out in the Collective Bargaining Agreement] * * * [were] the exclusive procedures for resolving grievances which fall within its coverage." *Id.* at 1454 (brackets in original) (quoting 5 U.S.C. 7121(a)(1) (1988)). The court declined to recognize a right to judicial review because "Congress narrowly circumscribed the role of the judiciary in its carefully crafted * * * scheme" by providing for judicial review only in certain instances. *Id.* at 1456. At the time of the 1994 amendment, other federal courts had adopted the *Carter* decision, uniformly holding that the CSRA precludes employees subject to a CBA's grievance procedures from bypassing those procedures and seeking judicial review. See, *e.g.*, *O'Connell* v. *Hove*, 22 F.3d 463, 468-471 (2d Cir. 1994); *Johnson* v. *Peterson*, 996 F.2d 397, 398 (D.C. Cir. 1993); *Saul* v. *United States*, 928 F.2d 829, 842 n.23 (9th Cir. 1991); see *Abbott* v. *United States*, 144 F.3d 2, 6 n.4 (1st Cir. 1998) (discussing *Carter*); *Parker* v. *King*, 935 F.2d 1174, 1176-1178 (11th Cir. 1991) (same), cert. denied, 505 U.S. 1229 (1992).

536 (quoting *Fausto*, 484 U.S. at 445). And the legislative history of the bill that contained the 1994 amendment confirms that Congress was aware that it would be "necess[ary] [to] explicitly stat[e] when Congress intends to give employees a choice of remedies." *To Reauthorize the Office of Special Counsel and to Make Amendments to the Whistleblower Protection Act: Hearing on H.R. 2970 Before the Subcomm. on the Civil Service of the House Comm. on Post Office and Civil Service*, 103d Cong., 1st Sess. 22 (1993) (statement of Robert M. Tobias, President, NTEU) (emphasis added). Thus, Congress would not have thought in 1994 that simply inserting the word "administrative" in Section 7121(a)(1) would create a new right to judicial review of matters subject to CBA grievance procedures. See *Karahalios*, 489 U.S. at 536 (noting that, because "Congress undoubtedly was aware" of the standard for recognizing implied private rights of action, "we would expect to find some evidence of that intent in the statute or its legislative history").

On the contrary, the scheme established in the CSRA evinces congressional intent to preclude judicial review except in the narrow circumstances set out in the statute itself. As discussed at pp. 4-6, *supra*, when an employee's position is covered by a CBA, the CSRA channels employee grievances through negotiated grievance procedures unless the subject matter of the grievance falls within an express statutory exception or has been specifically exclude l from coverage by the CBA itself. If the negotiated procedures do not resolve the grievance, either the union or the agency may invoke binding arbitration, 5 U.S.C. 7121(b)(1)(C)(iii), with subsequent review of the arbitrator's decision by the FLRA, 5 U.S.C. 7122(a). That structure reflects "the Congres-

sionally unambiguous and unmistakable preference for exclusivity of arbitration[, which] is a central part of the comprehensive overhaul of the civil service system provided by the CSRA." *Muniz* v. *United States*, 972 F.2d 1304, 1309 (Fed. Cir. 1992). "To hold that the district courts must entertain such cases in the first instance would seriously undermine what [the Court] deem[s] to be the congressional scheme." *Karahalios*, 489 U.S. at 536-537; accord *Fausto*, 484 U.S. at 449 (holding that judicial review outside the framework of the CSRA would be incompatible with various "structural elements" of the CSRA, such as "the primacy of the MSPB for administrative resolution of disputes over adverse personnel action, and the primacy of the United States Court of Appeals for the Federal Circuit for judicial review").

Moreover, the structure of the CSRA shows that Congress knew how to explicitly grant judicial review of matters subject to negotiated grievance procedures when it desired that result. Congress expressly provided that, if a matter involves an adverse employment action covered by 5 U.S.C. 4303 or 7512, the employee may seek judicial review of the arbitrator's award under 5 U.S.C. 7703 in the same manner and under the same conditions as if it had been rendered by the MSPB. Congress's provision of an express right to judicial review for those matters is evidence that Congress intended to preclude such review for all others. See *Fausto*, 484 U.S. at 447-450; *Erika*, 456 U.S. at 208.

Indeed, reading Section 7121(a)(1) to authorize judicial review implicitly, as the Federal and Eleventh Circuits did, would produce an anomalous result. As required by the regulations implementing the CSRA, federal agencies have established their own grievance pro-

cedures for employees who are not covered by CBAs and therefore are not subject to the grievance procedures contained in such agreements. See 5 C.F.R. 771.201 (1995) (requiring such grievance procedures).[11] Under the Federal and Eleventh Circuits' interpretation of the amended Section 7121, federal employees subject to a CBA may now avoid the grievance procedures established by the CBA and present their grievances directly to the courts without resort to any administrative procedures at all. But, because Section 7121 applies only to grievance procedures established by CBAs, federal employees who are not subject to CBAs would remain limited to using their agencies' internal grievance procedures and would be precluded from judicial review. Such preferential treatment of employees subject to CBAs makes no sense. There is no reason to believe that Congress intended to grant federal employees who have the benefit of union representation a right to bypass grievance procedures that are the product of collective bargaining and go directly to court—even for minor disputes—while continuing to subject other federal employees to grievance procedures that they had no say in adopting.

The Federal and Eleventh Circuits' construction of Section 7121(a)(1) also defies this Court's admonition that courts should be cautious about interpreting technical and conforming amendments to make substantive changes to the law when "there is no indication that

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[11] The Office of Personnel Management later rescinded the regulations governing agency administrative grievance procedures to permit agencies greater flexibility in the establishment of grievance systems. 60 Fed. Reg. 47,039 (1995). But each agency was required to maintain its previously established grievance systems until the system was either modified or replaced. 5 CFR 771.101.

Congress intended to change" the law. *Director of Revenue* v. *CoBank ACB*, 531 U.S. 316, 323 (2001). Conforming amendments are typically added for the sake of clarity and are not intended to change legal standards. See *e.g.*, *INS* v. *Stevic*, 467 U.S. 407, 428 (1984). The Federal Circuit's reading "would mean that Congress made a radical—but entirely implicit—change" in the 1994 amendment. *CoBank*, 531 U.S. at 324. "[I]t would be surprising, indeed, if Congress" had done that "*sub silentio*." *Id.* at 323. See *Mudge* v. *United States*, 50 Fed. Cl. 500, 506 (2001) ("We find it inconceivable that Congress intended to alter this basic structural reform of the Civil Service Reform Act by a one-word change that was introduced as a technical amendment without discussion, explanation, or debate."), rev'd, 308 F.3d 1220 (Fed. Cir. 2002).

The insertion of the word "administrative" in Section 7121(a)(1) was intended to clarify what remedies are available to federal employees pursuing grievances. As explained at pp. 6-8, *supra*, the 1994 Amendments added a new Subsection (g) to Section 7121, which gave federal employees a choice of administrative remedies—either the negotiated grievance procedure or a different administrative procedure specified by statute—for grievances concerning prohibited personnel practices other than discriminatory personnel actions. Similarly, under Subsections (d) and (e), federal employees have a choice between these administrative remedies for addressing grievances relating to discriminatory personnel practices and adverse actions, respectively. Employees asserting grievances about matters covered under Subsections (d), (e), and (g), are also entitled to judicial review of administrative determinations regarding their grievances in some circumstances. See pp. 3-4, *supra*. The

conforming amendment clarified that the negotiated grievance procedure would be the exclusive "administrative" remedy "except" in the circumstances identified by those three Subsections. By adding the word "administrative," Congress more accurately described the available alternative administrative remedies available to federal employees—the negotiated grievance procedures in some circumstances, a choice between those procedures and specified statutory procedures in other circumstances—without creating any implications for the wholly separate question of judicial review.

In addition, the amendment conformed Subsection (a) with Subsection (f), which addresses the availability of judicial review of arbitration awards involving adverse actions under the CSRA and "similar" matters under other personnel systems. Because Subsection (a) does not expressly reference Subsection (f), prior to the conforming amendment Subsection (a)'s statement that the CBA's grievance procedure constituted the "exclusive procedure[] for resolving grievances which fall within its coverage" might have appeared to conflict with Subsection (f)'s provision of judicial review of arbitration awards stemming from grievance procedures involving adverse actions. By clarifying that the CBA grievance procedures are the "exclusive administrative procedures," the conforming amendment helps avoid the misconception that Congress intended in Subsection (a) to limit judicial review otherwise available under Subsection (f) of the CSRA.

2. This case implicates recurring issues of considerable practical importance both to the Nation's largest employer and to its employees. The Federal and First Circuits' decisions permitting judicial review of federal employees' complaints that concern neither adverse ac-

tions nor prohibited personnel practices undermines the intricate system Congress created in the CSRA and PMS. Such flouting of the "considered congressional judgment" that federal employees are not entitled to judicial review of some types of employment-related complaints, *Fausto*, 848 U.S. at 448-449, also creates an untenable lack of uniformity in federal employment law.

That problem is compounded by the direct conflict among the courts of appeals over the meaning of the 1994 amendment to Section 7121(a)(1). The rule adopted by the Federal and Eleventh Circuits could require the federal government to litigate employee grievances in federal court in the first instance, involving considerable delay and additional expense compared to the traditional—and congressionally preferred—remedy of addressing such claims through the negotiated grievance process, followed by the availability of binding arbitration. Because employment grievances of the sort governed by Section 7121(a)(1) are common, the rule adopted by the Federal and Eleventh Circuits would create a significant litigation burden on the government. That approach also undermines the role of the collective bargaining representative in resolving grievances and interferes with the government's ability to resolve complaints expeditiously through the grievance process or binding arbitration.

Accordingly, this Court's review is warranted.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

ELENA KAGAN
Solicitor General
TONY WEST
Assistant Attorney General
WILLIAM KANTER
HOWARD S. SCHER
Attorneys

SEPTEMBER 2009